NO. 49887-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ERIC JACOBSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Eric Jacobson was tried for offenses engineered from an undercover police operation that directed the enterprise from start to finish. At trial, the prosecutor's extensive, repeated and flagrant misconduct, much of which was over Jacobson's objection, prejudiced the fairness of the proceeding. The prosecutor thematically conflated the proof required for the two charged offenses and likened attempted rape of a child to merely intending to see a movie. He encouraged a verdict on improper bases including sending a message by holding Jacobson "responsible," and because all people who talk about sex with children will actually have sex with children, although there was no such evidence in the record. Throughout trial and argument, the prosecutor also bolstered the credibility of police witnesses and elicited a heroic picture of their undercover operations. The prosecutor also called Jacobson's defense "BS." He also used voir dire for improper purposes.

This egregious prosecutorial misconduct alone requires reversal. However, reversal is also compelled by outrageous police conduct and because the evidence on both counts was insufficient.

B. ASSIGNMENTS OF ERROR

1. The prosecutor committed repeated and wide-ranging misconduct, much of which was objected to and which was flagrant and ill-intentioned.

2. The State presented insufficient evidence to prove beyond a reasonable doubt that Jacobson attempted to agree to pay a fee to a minor or a third person pursuant to an understanding that, in return, such minor will engage in sexual conduct with him, or did solicit, offer, or request to engage in sexual conduct with a minor in return for a fee.

3. Jacobson's article I, section 21 right to a unanimous jury was violated because alternative means were presented to jury without requiring unanimity as to the means.

4. The State presented insufficient evidence to prove beyond a reasonable doubt that Jacobson attempted to commit rape of a child in the first degree.

5. The police conduct during the "Net Nanny" sting operation was so outrageous that it violated Jacobson's due process rights.

6. The community custody condition prohibiting Jacobson from accessing or using the internet, including email, without prior approval is unconstitutionally overbroad.

7. The community custody condition prohibiting Jacobson from "use of a computer, phone or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes" and allowing "random searches of any computer, phone or computer-related device to which [Jacobson] has access" is unconstitutionally overbroad.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. As a quasi-judicial officer, a prosecutor must not encourage verdicts based on facts not in evidence, prejudices, or emotions; cannot misstate the law or reduce the burden of proof; and cannot opine on guilt, disparage the defense, or bolster police witnesses. Here, the prosecutor misstated the law and lessened the burden of proof by conflating the proof required for the two charged offenses and likening attempted child rape to intending to see a movie, thereby minimizing the intent the State was required to prove. He encouraged a verdict on improper bases including holding Jacobson accountable, the other successes of the Task Force, the "filth" contained on Craigslist, and because all people who talk about sex with children will actually have sex with children. This latter argument and several additional arguments were also based on facts not in evidence and were calculated to inflame the jurors' passions and prejudices. The prosecutor also called Jacobson's defense "BS" and maligned Jacobson's

"choice" of defense. He also used voir dire for improper purposes. Did the prosecutor's extensive misconduct prejudice Jacobson's due process right to a fair trial, requiring reversal and remand for a new trial?

2. Outrageous police conduct that shocks the universal sense of fairness violates due process. Police conduct that offends due process cannot form the basis of a criminal conviction against an individual. Should the charges be dismissed for outrageous government conduct where the police initiated and integrally controlled the Net Nanny operation, cast a wide net not aimed at individuals suspected of criminal activity, and overcame Jacobson's reluctance to commit a crime by persistence and pleas of sympathy?

3. Attempted commercial sexual abuse of a minor requires the State to prove that the accused agreed to pay or solicited, offered, or requested "a fee" in exchange for sexual conduct. The word "fee" generally refers to a sum of money. Did the State fail to prove this count where there was no evidence Jacobson agreed to pay, solicited, offered, or requested a sum of money, as recognized in the State's evidence?

4. Where alternative means of committing a single offense are presented to the jury, the conviction must be reversed for insufficient evidence where the evidence is insufficient on either alternative. Was the evidence insufficient to prove Jacobson solicited, offered, or requested

sexual conduct in exchange for a fee where the undercover police initiated the few instances where gifts or donations were discussed?

5. Attempted rape of a child in the first degree requires proof beyond a reasonable doubt that the accused intended to engage in sexual intercourse and took a substantial step to engage in sexual intercourse with a person under the age of 12. Was the evidence insufficient on this count where the fictitious individual was frequently held out to be 12 years old, Jacobson did not commit to any particular conduct, he was arrested without having gone to the home address provided, and when arrested he did not have any fee, gift, or donation with him?

6. A person on community custody has a First Amendment right to access and distribute written and visual material on the internet. A condition of community custody infringing on this right is constitutional only if the condition is narrowly tailored and sensitively imposed, and only if there are no reasonable alternative ways to protect the public. Are the conditions of community custody completely barring Jacobson from using the internet and computers, phones and computer-related devices with access to the internet unconstitutionally overbroad, where the record does not show such a sweeping prohibition is necessary to protect the public?

D. STATEMENT OF THE CASE

1. The Missing and Exploited Children Task Force initiates and controls Net Nanny operations throughout the State.

Under the auspices of the Missing and Exploited Children's Task Force, Washington State Patrol Detective-Sergeant Carlos Rodriguez investigates cases of child exploitation and tries to prevent people from harming children. RP 132.[1] But the Task Force actually takes a "proactive" role of "going after" people it "believes" want to do harm to children. RP 132.

Rodriguez has supervised five Task Force operations: in Kitsap County in August 2015, in Pierce County in December 2015, then Snohomish County in February 2016; the Task Force next moved to Spokane in July 2016, then to Thurston County in September and October 2016. RP 134. The Task Force receives funding from public and private donations and from other agencies. RP 359-61. There is a lot of money available to them for overtime work, but if they do not produce arrests there likely would not be funding in the future. RP 360-62.

[1] The verbatim report of proceedings are contained in one volume from 9/1/16, 10/25/16 10/26/16, and 10/27/16, referred to here as "RP (9/1/16)"; five consecutively paginated volumes referred to as "RP"; and one volume for sentencing referred to as "RP (12/2/16)"

For each operation, Rodriguez sets up a house from which operations are conducted and at which arrests and interviews can occur. RP 208. He supervises two employees who help with communications. RP 208. Rodriguez also staffs two people to assist with intelligence gathering, an arrest team of at least three people, a person to process evidence, a search warrant team, six to eight people to conduct surveillance, another person to handle technology, a team of people to interview arrestees, someone who is trained to conduct polygraph examinations, and two or three people trained in computer forensics. RP 208-09. "So generally, there is anywhere from 40 to 50 people" working a single Net Nanny operation. RP 209.

During an operation, the Task Force posts two to four advertisements on Craigslist every day and receives hundreds to thousands of responses. RP 137-38, 140. The Task Force posts advertisements in the Casual Encounters section of Craigslist, which Rodriguez described as for "no strings attached" relationships (or "hookups with no expectations") and is free. RP 136-37, 140-41. Rodriguez and his staff engage in conversations with people until they are willing to show up, which can take anywhere from 30 minutes to more than a month. RP 209-10. Rodriguez also responds to advertisements posted by others. *E.g.*, RP 152-53.

> So Net Nanny Operation, it's a proactive way to go after people or identify people who we believe want to do harm to kids. They are – it's where we place or answer ads on Craigslist, it's usually Craigslist. And we use undercover officers to either pretend to be the children or to be the parents who are essentially pimping out their children or wanting to talk to people who are actually doing that.
>
> And then once that happens, once we identify them, hopefully we arrest them. And then in the long run is to see if those -- is to rescue children, as well. We are also trying to do that.

RP 132-33.

By October 2016, the Task Force touted 60 arrests through its Net Nanny operations. RP 119-20. Most of the people arrested had no prior record. *See* RP 119-20; *State v. Racus*, No. 49755-7-II, Opening Brief at 3 (filed Jun. 9, 2017). At that time, Rodriguez alone served as the primary communicator. Now, he testified, there are so many officers assisting it is "like a call center." RP 251-52. The Task Force has also increased the number of arrests. RP 253.

2. In Pierce County, the Task Force posted an advertisement on Craigslist to initiate criminal activity and then controlled the activity.

The Task Force's Net Nanny operations are "all very similar" with only minor distinctions. RP 134-35. In the Pierce County operation, Rodriguez played the part of a woman, "Kristl," in her 30s with three children; another officer, Trooper Anna Gasser, played the role of a 13-

year-old girl.[2] RP 135-36, 166-67. In the "woman for man/woman in the Tacoma area," section of Casual Encounters, Rodriguez posted an advertisement titled "Young family fun, no RP lets meet." RP 165; Ex. 1. "RP" was intended to stand for no "role play." RP 151. The text of the advertisement stated, "looking for crazy fun time. only serious need respond. no solicitations. single mom with 2 daus and 1 son." RP 165; Ex. 1.

John Tepinen responded, "Hey there. I am down for some fun. Let's trade pics." RP 197, 207.

Rodriguez engaged as "Kristl" with Tepinen, responding "not into trading pics, that leads to endless chat and nothing else. if you want to meet tell me aout your experiences or what you want first."[3] RP 227-28; Ex. 2, p.1. Tepinen emailed, "plain and simple, some play with one or both of your daughters is all I would be interested in. Depending on their look . . . ." Ex. 2, p.1.

The Task Force then spent the next two days exchanging communications with Tepinen, who was actually Eric Jacobson. Exs. 1, 2,

[2] In some cases, the Task Force pretended the officer was younger than 13—an 11 or 12 year old girl—but the record does not illuminate how Rodriguez determined what age to make the fictitious girl in any given case.

[3] The typographical errors are contained in the original. These errors were sometimes placed by the Task Force intentionally and were sometimes the result of work done too quickly. RP 235-36. The errors will be maintained in this brief without notation.

4, 7, 8, 9; RP 607-08. Rodriguez provided him with a cell phone number for text message exchanges. RP 227-28; Ex. 4. As Kristl, Rodriguez told Jacobson that her daughters are age "eleven, nearly 12, and 8." RP 257. Jacobson asked for a picture of the older daughter but replied "Eight is just too young." RP 257. He later confirmed the children's ages as "12 8 and ?" Ex. 4, p.8. "Kristl" responded, my "son is 13." Ex. 4, p.8. Rodriguez did not correct Jacobson to explain that "Lisa" was actually only 11. *Id*.

Rodriguez sent photographs of Washington State Trooper Anna Gasser at age 15 or 16 years old, telling Jacobson it was "her" older daughter named "Lisa." RP 258, 261; Ex. 4, pp.1, 2. Rodriguez obtained Gasser's consent when he approached her in plainclothes in the Bellevue Police Department parking lot after he walked by her and stated to his detective "Did you see how young that trooper looked?" RP 258-59.[4]

[4] Rodriguez testified on direct:

> Q How was it that this trooper got to be part of this investigation?
>
> A So I was working a case in Bellevue, and I was walking into the district office, and I walked by this trooper and talked to my detective, and said, "Did you see how young that trooper looked?" And then I approached her in the parking lot asking to use pictures in our investigation.
>
> Q When you approached her in the parking lot, were you in a uniform?
>
> A No, I wasn't.

Later, Rodriguez as Kristl sent Jacobson a photograph of postal inspector Samantha Knoll, telling Jacobson it was a picture of Kristl. RP 264-65.

"Kristl" told Jacobson that "Lisa" "hasn't been all the way," but "is ready." Ex. 4, p.4. After Jacobson spoke on the telephone with postal inspector Samantha Knoll posing as the voice of "Kristl," Jacobson messaged that he could "help with that." Ex. 4, pp.4-5; Exs. 7, 8.

3. Jacobson tried to withdraw from communications but the Task Force did not let him.

Jacobson set forth parameters by which he could abide, suggesting "I'd feel better if we could all just meet somewhere, and have an innocent chat over coffee or ice cream or something." Ex. 4, p.10. But Rodriguez

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> Q Did you make sure that you identified yourself as someone who wasn't just a creepy person?
>
> A Yes. After I realized what I said to her, I made sure I showed her my badge and my commission card.
>
> Q Is she now actually part of the Missing and Exploited Children's Task Force for purposes of being 11?
>
> A Yes, she is.
>
> Q During this particular investigation, did she play the role of Lisa?
>
> A Yes, she did.

RP 259.

as Kristl responded, “no way John. i have a systime.” *Id*. Jacobson then proposed meeting at a gas station. *Id*. “Kristl” rejected that proposal as well, texting him “so have a great life. like i said. i have a system and it has kept me out of trouble. i will not change.” *Id*. Jacobson responded by indicating he was prepared to end the discussion: “Ok.” Ex. 4, p.11.

However, Rodriguez continued to text Jacobson “so that means no go right?” Ex. 4, p.11. Rodriguez renewed negotiations with Jacobson and sent him a playful photograph of Knoll and Gasser in Santa hats with a sign that reads “John Don’t you want to open our presents?!! 12-16-15.” Ex. 4, p.11. Gasser is barely peeking out from behind Knoll’s shoulder. *Id.* Rodriguez, as Kristl, then texted “Soooooo.” Ex. 4, p.11.

Next, Rodriguez provided Jacobson with the address of a gas station where “she” could view Jacobson before he came over to the house. Ex. 4, p.10. Jacobson told Kristl he did not want to go forward with the plan: “To be honest, I’d feel better if we could all just meet somewhere, and have an innocent chat over coffee or ice cream or something.” Ex. 4, p.10. “Kristl” responded, “no way JOhn. i have a systime. answer a different ad then.” *Id.*

Jacobson subsequently messaged “I just drove by the address you gave me for the 76 station, and you gave me the address to a home residential neighborhood. So sorry, this is all seeming to be something it’s

really not." Ex. 4, p.11. Rodriguez responded, "really? i googled it. ill look it up again." Ex. 4, p.11. When Jacobson explained he "got a little spooked, I did leave the area and I'm headed home[,]" Rodriguez as Kristl provided Jacobson with an alternative address. Ex. 4, p.12.

Jacobson suggested another online conversation instead of meeting in person; Rodriguez responded "im done with you . . . i will find someone else." Ex. 4, p.12. To which Jacobson again replied, "Ok." *Id.* "Kristl" still pursued the conversation, telling Jacobson, "im upset with you k=now ihave to tell [Lisa] you arent coming. I shouldnt have let her talke to you." RP 322; Ex. 4, p.12. Jacobson responded "Ugh…I feel bad." Ex. 4, p.12. Then, "Would there be any harm in me coming over tonight still?" *Id.* "Kristl" asked him to bring Skittles, condoms and lubricant. Ex. 4, pp.12, 13; RP 371-72 (candy was used by Task Force as a form of identification). And asked, "are you still good with gifts? i cnat' remember if we agreed o anything." Ex. 4, p.13.[5] Jacobson responded, "You mentioned a few things. Anything I brought I would give to you to disperse however you saw fit." *Id.* When Rodriguez, as Kristl, asked "what did you have in

[5] According to Rodriguez, money is not explicitly discussed on Craigslist because it "is illegal" and "against the Craigslist guidelines." RP 162. Instead, according to Rodriguez, forms of payment are discussed as "presents or gifts; donations are welcome; generosity is nice. And then payment is generally something of value, so – or another term like 'roses' typically means money or flowers, things like that." RP 162-63.

mind hun. anything helps," Jacobson replied, "A gift card, that can be used for any purpose." *Id*.

When Jacobson drove to the address he was provided, a 76 gas station, "Kristl" told him her car would not start and provided the address for the Task Force's operation house. Ex. 4, pp.14-15; RP 329-31. Jacobson was arrested as he drove away from the gas station a few blocks from the house. RP 332, 434-38, 444-52, 454-58. He was not following a direct route from the gas station to the house when he was stopped. RP 458. He had two bags of Skittles, condoms, lubricant, a wallet with $13 cash, and a cellular phone with him. RP 337-38, 343-45, 371, 440-41, 453. He did not have any gift cards. RP 371.

4. Procedural posture.

Pierce County charged Jacobson with one count of attempted rape of a child in the first degree (RCW 9A.44.073; RCW 9A.28.020) and one count of attempted commercial sexual abuse of a minor (RCW 9.68A.100; RCW 9A.28.020). CP 1-2.

Jacobson moved to dismiss count two, attempted commercial sexual abuse of a minor, because the offense requires agreement to pay a "fee." CP 6-11. The "fee" language limits the crime to agreements to exchange money, in direct contrast with the federal statute, which criminalizes the exchange of anything of value. RP 41-42, 44 (referring to

18 U.S.C. § 1591). There was no evidence of any agreement to exchange money here. RP (9/1/16) 29-58. But the trial court ruled that a rational finder of fact could find the statement "are you okay with gift cards" to be an agreement to provide a fee although no amount was mentioned. RP (9/1/16) 59-61. In a post-trial written ruling, the court found Jacobson knew from the context of the conversations the terms gifts, roses, gift cards, donations, Tracphone minutes, and Skittles were being used to convey an exchange of monetary amount for a sexual act with a minor. CP 77-80. After trial, the Legislature amended the statute to change "fee" to "anything of value," mirroring the broader federal statute. Laws of 2017, ch. 231, § 3; *see* 18 U.S.C. § 1591; Senate Bill Report, SB 5030 (Apr. 6, 2017) (amended version "broadens" forms of payment criminalized under statute)[6].

At trial, the prosecutor elicited testimony about the important purposes of the Task Force's sting operations and highlighted that testimony in argument to the jury. RP 117-20, 132-35,140, 149-50, 160-61, 208-09, 390, 798-99. The prosecutor also argued from facts not in evidence and appealed to the jury's emotions. For example, he told the

[6] *Available at* http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bill%20Reports/Senate/5030%20SBR%20HA%2017.pdf.

jury that the Casual Encounters section of Craigslist contains "filth like no other." RP 119-21. He also argued,

> There aren't many things that are black or white, one or the other, but I am going to suggest to you that there is one thing that is black and white, and that's this: An adult will either have sex with a child or will not. There isn't any gray area there. An adult either will or will not.
>
> And I am going to go a little bit further than that and say that an adult that is willing to talk about having sex with a child falls in the category of an adult who will because there isn't any adult in our society to whom the idea of sex with a child is repulsive, who will talk about having sex with a child. That doesn't happen in the real world.

RP 786-87. The prosecutor's misconduct extended far beyond these examples and is set forth in the argument section below.

Eric Jacobson testified in his own defense. He admitted to being "an active kinkster or fetishist for 5-6 years" engaging in legal but alternative lifestyle. RP 554-55, 598-99, 651-53. Jacobson explained that he responded to this advertisement, as he had to others, with the understanding that the advertiser was looking to engage in "role play" where an adult partner plays the role of a younger, submissive person. RP 555-61, 563-64, 575-76, 598-603, 661. After multiple defense objections to the prosecutor's argumentative cross-examination were sustained, the trial court *sua sponte* chastised the prosecutor for editorializing. RP 608-09 (objection sustained to prosecutor's question "do you think it sounded

truthful?"); RP 610-11, 710, 729, 730, 747 (objections to argumentative questioning are sustained); RP 626 (objection sustained to prosecutor's request to defendant to "agree" not to "editorialize"); RP 709 (objection to prosecutor's question whether Jacobson "had occasion to successfully bring a woman to an orgasm" is sustained); RP 749-50 (objection sustained where prosecutor asks Jacobson for a legal conclusion), RP 759 (court's *sua sponte* remark to prosecutor, "let's get the question then instead of editorial. Let's get the question.").

In the end, the jury convicted Jacobson as charged. CP 41-42. At sentencing, Jacobson told the court that the day he was arrested fell on the nine year anniversary of the death of the youngest of his five sons; six years before that, his twin sons passed away as infants. RP (12/2/16) 25. "These losses fueled a long-term battle with alcoholism, spiritual and emotional turmoil, divorce and on the heels of all of that, I became embroiled in [the fetishist, kinkster] life-style" explained in his testimony. *Id*. He continued by explaining,

> It goes without saying that parents who experience the loss of a child also experience an unfathomable depth of pain and grief. Left unchecked for years, I finally sought out one-on-one grief counseling which helped me learn coping strategies and gain perspective on my sons' deaths and how they impacted my life. This counseling occurred from approximately 2009 through 2012.
>
> October 29 of 2015, I voluntarily entered alcohol

> rehab as an inpatient at Schick Shadel Hospital. I successfully completed the treatment program November 10 of 2015.

RP (12/2/16) 26.

Although Jacobson has no criminal history, he was sentenced to an indeterminate prison term of 85 months to life. CP 59, 62. Even if he is released from prison, he will be subject to community custody for the remainder of his life. CP 62.

E. ARGUMENT

1. The prosecutor committed extensive, repeated, and multitudinous misconduct.

The prosecutor's pervasive misconduct substantially deviated from his duty as a quasi-judicial officer to ensure that Jacobson received a constitutionally fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); *State v. Fuller*, 169 Wn. App. 797, 812, 282 P.3d 126 (2012); *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). "The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." *State v. Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). "A ' "[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of

guilt into the scales against the accused.' " *Monday*, 171 Wn.2d at 677 (alteration in original) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); *see State v. Reed*, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984)).

The prosecutor's misconduct was extensive and pervasive. The broad misconduct was aimed at lessening the constitutional reasonable doubt standard, improperly bolstering the State's case, appealing to the jury's passions and prejudices, relying on facts not in evidence, opining on Jacobson's guilt, disparaging the defense, and utilizing voir dire to influence the jury on the facts, to introduce evidence not admissible at trial, and to prejudice the jury.

a. The prosecutor committed misconduct by vouching for the State's witnesses and bolstering the State's case throughout trial and in his argument.

Even if the record supports the argument, it is generally improper for prosecutors to bolster a police witness's good character. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). Throughout the trial and his arguments to the jury, the prosecutor bolstered the Task Force's actions and vouched for the police witnesses' credibility. Through these arguments, the prosecutor also inflamed the jury's passions and prejudices, encouraging a verdict on impermissible bases. *E.g.*, *Glasmann*, 175 Wn.2d at 704.

i. *Vouching and bolstering during opening and closing argument.*

The prosecutor relied on this prohibited theme in his opening statement. He told the jury that the Task Force works together to keep children safe, has held operations in several counties since 2015, have arrested over 60 people, and is "certainly" effectuating its purpose. RP 119-20. The prosecutor further told the jury that some of the arrestees "have been registered sex offenders. Most of them have not. Some of them have offered their own children for sale or to exchange with these others." RP 120.

The prosecutor created demons not present in Jacobson's trial—Jacobson has no criminal history, he was not a registered sex offender, and he did not offer his own children for sale or exchange. RP 119-20.

In juxtaposition, the prosecutor posited the Task Force and the police as the heroes. In closing, the prosecutor held the police witness up against Jacobson and argued the jury should find the police more credible. The prosecutor first improperly argued that Jacobson has an interest in this case and considerations of bias or prejudice should be applied to Jacobson in particular. RP 798. Defense counsel's objection to this argument was sustained. *Id*. The prosecutor continued by presenting the inverse

argument—not that the jury should look more critically at Jacobson but that it should look more favorably at the police witnesses' testimony.

> Ask yourself, what interest do [Detective Rodriguez, Inspector Knoll, Agent Berg, Trooper Gasser and Detective Garden] have in the outcome of this case? What bias? What prejudice? You've heard that they have done five or six operations and dealt with hundreds of these people and arrested 60-plus. What interest do they have in this particular case above any other case that they have investigated?

RP 798-99. This was improper vouching. *Jones*, 144 Wn. App. at 293.

ii. *Vouching and bolstering throughout trial*.

Beyond the argument portions of trial, the prosecutor drew on this theme during witness testimony. For example, he questioned witnesses at length about the work of the Task Force generally.

> Q What is the purpose in general of the Missing Exploited Children's Task Force with the State Patrol?
>
> A So the purpose is to investigate cases dealing with child exploitation, to recover children -- basically, keep people from doing harm to children.

RP 132. In this case, there were no children to "recover," and yet the prosecution drew on that theme repeatedly. For example, the prosecutor then asked Rodriguez to describe Net Nanny Operations:

> So Net Nanny Operation, it's a proactive way to go after people or identify people who we believe want to do harm to kids. They are – it's where we place or answer ads on Craigslist, it's usually Craigslist. And we use undercover officers to either pretend to be the children or to be the

> parents who are essentially pimping out their children or wanting to talk to people who are actually doing that.
>
> And then once that happens, once we identify them, hopefully we arrest them. And then in the long run is to see if those -- is to rescue children, as well. We are also trying to do that.

RP 132-33. The bolstering continued,

> Q So in the Net Nanny Operations, are you -- are officers playing the roles of children?
>
> A Yes.
>
> **Q How is that helping to protect the children in general?**
>
> A Because when people are showing up to do something to a child, that's a child that they are not -- you are keeping them from doing that to a child. In these operations, we have also identified or removed 18 kids. We have located children through these operations.
>
> Q Removed them from where?
>
> A From people who were offering them up to us, from people who showed up to do things with our children or our undercover officers, children, and they had access to children. Also through interviews, we have discovered evidence that we have located on them, we have discovered that they were hands on or had images of things happening to kids, so we went and found those kids.

RP 133-34 (emphasis added); *accord* 149-50 (testimony that incest "is generational and there are victims in the house, so . . . [if] they showed up to do something with the family that I am putting out there, potentially it

could be two additional victims"). Again, these factual scenarios were not at issue here, but played on the jury's fears and prejudices.

The prosecutor continued by eliciting testimony on the Task Force's arrest and operations records, which was used to bolster the police, to suggest that this is a problem that needs to be solved by arrest and prosecution, and to submit that Jacobson can be found guilty by association. *E.g.*, RP 134-35, 140 (describing hundreds of responses within 10 minutes to an advertisement in Kitsap County and over 1,000 responses in Spokane), 160-61 (Rodriguez posts advertisements the day before he intends to make arrests), 169 ("triag[ing] responses to advertisement for "someone who [you believe] is really going to show up and truly want to meet with you"), 208-09.

The prosecution returned to the success in numbers and law enforcement as heroes themes on redirect,

> Q By the way, are the Net Nanny Operations going to continue into next year?
>
> A They will continue as long as I can do them.
>
> Q Are you planning to do more of them?
>
> A Yes.
>
> Q Have they been successful in what you've been intending to do with them?
>
> A Absolutely.

> Q Which is what?
>
> A To get people who are trying to do harm to kids and to rescue children.

RP 390.

This evidence was elicited improperly to vouch for the conduct of the police and to bolster the State's case.

b. The prosecutor introduced these themes when he used voir dire to educate the jury to the facts of the case, to introduce evidence not admissible at trial, and to prejudice the jury against Jacobson.

The purpose of voir dire "is to enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause and determine the advisability of interposing their peremptory challenges." *State v. Laureano*, 101 Wn.2d 745, 758, 682 P.2d 889 (1984) (quoting *State v. Tharp*, 42 Wn.2d 494, 499-500, 256 P.2d 482 (1953)). Criminal Rule 6.4(b) also describes the scope of voir dire:

> (b) Voir Dire. A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. . . . The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

While attorneys are allowed to question jurors to determine potential bias on matters that might arise at trial, voir dire is not an opportunity for the parties to persuade the jury panel on particular facts of the case, to prejudice the jury against a particular party, to argue the case or to compel jurors to commit themselves to a particular vote. *State v. Frederiksen*, 40 Wn. App. 749, 752, 700 P.2d 369 (1985) (quoting *California v. Williams*, 29 Cal. 3d 392, 174 Cal. Rptr. 317, 325, 628 P.2d 869 (1981)).

The American Bar Association, accordingly, confines the prosecutor's role during voir dire:

> The opportunity to question jurors personally should be used solely to obtain information for the intelligent exercise of challenges. A prosecutor should not intentionally use the voir dire to present factual matter which the prosecutor knows will not be admissible at trial or to argue the prosecution's case to the jury.

Am. Bar Assoc'n Standards 3-5.3(c).[7]

Here, the prosecutor improperly used voir dire to influence the jury's resolution of the case. He asked not only about familiarity with Craigslist, but also "has anyone been into the Casual Encounter section of Craigslist?" RP 10-11. He then proceeded to educate the jury: "the Casual Encounter section of Craigslist which for those of you who have

[7] *Available at* https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blkold.html (last visited Jun. 29, 2017).

never heard of it has dating services, sex services, nudity, all kinds of stuff." RP 12. He introduced the topic of "flagging" an advertisement on Craigslist. RP 17. Then, unsatisfied with one of the juror's responses to his question "what happens when you flag the ad," the prosecutor answered the question himself, "Someone out there in the Internet reads the ad and decides whether or not Juror 25's complaint was legit. If it is, the ad is gone, and if it's not, it stays up." RP 18. The prosecutor then continued to use voir dire to educate the jury to Craigslist and its sexual perversity. RP 19-21.

In his second round of questioning, the prosecutor described his case at length and conducted another monologue on Craigslist's Casual Encounters section:

> MR. NEEB: Okay. Yeah, so let me ask you this: What strikes me as one of my difficulties in this particular case is, is that -- so one of the things I intend to do during this case is to present a detective who is going to walk people through the Craigslist Casual Encounter section, and I assure you it's going to be eyeopening. But I also am not surprised at all that not one person in here raised their hand when I said, "Have you been on the Casual Encounter section?" Because if you have, you are not going to raise your hand in a group full of people, especially that are all strangers, and say, "You know what? I saw a whole bunch of naked people who are **offering sex for money**, and oh, by the way, they **were offering kids for sale, too**," because it's kind of difficult to explain what you were doing there, right?

> I mean, it's not like you just happened to – I mean, sometimes the dirty magazines are right there in the magazine section, and you can't help but see the cover of them, right? This isn't quite the same thing. This is casual encounters where you have to click and it actually says, "Are you over 18 to go in here?" Right? I think, No. 1, you talked about how the websites have put these rules in place, one of which is you need to be over 18 when you are going into the Casual Encounter section.
>
> PROSPECTIVE JUROR: I haven't read them in depth, but I am sure.
>
> **MR. NEEB: I am telling you, you have to say, "Yes, I am over 18."** And you know how you do that? Click. And it's just that simple. So I guess then here -- so here is the question: How do I find the people, the person, if there is any, the people who have been on the Casual Encounter section of Craigslist and don't want to talk about it? How do I do that? That's kind of a rhetorical question. I don't expect anybody to answer that, but if you can, I'd sure love to hear it.

RP 59-60 (emphases added).

The prosecutor also used voir dire to present factual matters that would not be admitted at trial and that were aimed at prejudicing the jury against Jacobson. For example, the prosecutor explored the theme of the "Casual Encounters" section as a place for illegal activity:

> MR. NEEB: What would you expect when you hear the name Casual Encounters? Sound permanent? Sound like no strings attached? Okay. Were you aware that you could find sex for sale on that website? Who here who is surprised to hear that you can find sex for sale on Craigslist.com? 30, why?
>
> PROSPECTIVE JUROR: I just am. I don't know.

> MR. NEEB: Okay. 28, why?
>
> PROSPECTIVE JUROR: This is going to sound naive, but isn't that illegal?
>
> MR. NEEB: Matter of fact, it is. Others? Anyone surprised or not surprised to know that you can actually pay for sex or, for that matter, get paid for sex on Craigslist?

RP 14-15. In this way, the prosecutor inserted his personal opinion on the ultimate issue in the case. *See State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) ("No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.").

The prosecutor continued by asking about the website Backpage.com and the arrest of its executive. More specifically, the prosecutor provided his own inflammatory description: "How many of you were aware of the recent news story that the CEO of Backpage was just arrested for running the largest online brothel in the world?" RP 15. This topic was unrelated to Jacobson's case, yet the prosecutor sought to associate the two cases. *See* RP 15-16 (linking arrest of Backpage executive to Craigslist).

The prosecutor also introduced the theme of "stings" conducted on the television program "To Catch a Predator." RP 22. The very name of the program is inflammatory. The prosecutor continued by eliciting a lack of sympathy for the objects of the stings in the program. RP 22-23;

accord RP 55-57 (returning to a lack of sympathy for the defendant). Then, he segued to the value in catching an individual before they have a chance to commit a crime: "In some respects it's a better idea than arresting somebody who committed the crime because you get them before they have a chance to. Anybody agree with that?" RP 23-24.

The prosecutor also elicited irrelevant information about jurors' prior experience in deliberations.

> MR. NEEB: Has anyone sat on a jury that deliberated but then was not able to reach a verdict, so it was a hung jury? Forty-nine?
>
> PROSPECTIVE JUROR: Yes.
>
> MR. NEEB: Frustrating?

RP 54. The only purpose to this question was to implant in the jurors' minds that a hung jury was unsatisfactory. This argument was contrary to the court's instruction that jurors "should not . . . surrender [their] honest belief about the value or significance of evidence solely because of the opinion of [their] fellow jurors. Nor should [they] change [their] mind just for the purpose of reaching a verdict." CP 38. The prosecutor's voir dire also violated the requirement that the court not suggest to the jury the need for agreement or the consequences of its failure to reach an agreement. *State v. Watkins*, 99 Wn.2d 166, 175, 660 P.2d 1117 (1983) (citing CrR 6.15(f)(2)).

c. The prosecutor also committed misconduct in closing argument that misstated the law and lessened the burden of proof.

The prosecutor committed misconduct that misstated the law and lessened the burden of proof when he argued that (i) the two charged counts—attempted rape of a child and attempted commercial sexual abuse of a minor—substantially overlapped, (ii) attempted rape of a child is like attempted going to the movies, and (iii) the jury should "hold [Jacobson] responsible."

i. *Arguing that the two charged crimes were substantially similar*.

A prosecutor's misstatement of the law constitutes misconduct. *State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015).

The court properly instructed the jury that "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count." CP 37 (instruction 13). Further, the State was obligated to prove to the jury beyond a reasonable doubt each element of each count.

The prosecutor, on the other hand, argued the two charged counts were substantially similar—although count one charged attempted rape of a child in the first degree and count two charged attempted commercial sexual abuse of a minor. The prosecutor argued during closing, "So there is a lot of overlap between the two crimes." RP 781. He then trivialized

the distinction between "sexual intercourse," an essential element of rape of a child, and "sexual conduct," the lesser essential element of commercial sexual abuse of a minor. RP 781. The prosecutor continued to diminish the distinct elements of the offenses by persuading the jury that "the only difference really between the completed crime is the element of 'for a fee.'" RP 781. More fully, the prosecutor argued:

> Both of those two things, sexual intercourse and sexual contact, equal sexual conduct. So the only difference really between the completed crime is the element of "for a fee." And when you agree to pay a fee to a minor or a third person in exchange for sexual contact with a minor, you've committed an additional crime here in Washington which is Commercial Sexual Abuse of a Minor. Because it's bad to have sex with any child, and it's equally bad to have sex with a child that you've paid for because now we are victimizing the child twice because they are being pimped out. That's the way the law looks at that.

RP 781-82.

The prosecutor subsequently returned to this theme, stating "I am going to talk about those [two] crimes again together because the elements are so similar." RP 782. Later, the prosecutor again conflated the counts, arguing "the element that is being disputed is his intent – if you believe and if you find that he thought he was talking about an actual girl, then he is guilty of both counts and if you find this was all pretend and he thought he was dealing with an adult who was going to pretend then he is not guilty of both." RP 785.

Conflating the two charges misstated the law and lessened the State's burden to prove every element of each count beyond a reasonable doubt.

ii. *Arguing that committing attempted rape and attempted commercial sexual abuse of a minor is like deciding to go to the movies but being interrupted by a phone call.*

In closing argument, prosecutorial comparisons to everyday decision-making "improperly minimizes and trivializes the gravity of the [beyond a reasonable doubt] standard [for criminal convictions] and the jury's role." *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014).

The prosecutor argued,

> If you put it in real-world terms, since none of you have been in a scenario like this defendant was in, if you put it in real-word terms, if you get together with your spouse or your children and you talk about going to a movie and you decide what movie you're going to go to, what theater you're going to go to, what time the movie is going to be, and then you get in your car and you drive to the movie; you have your money; you get some candy because you are not going to pay that kind of price at the movie theater and it's in your pocket; you get to the movie theater and the phone rings and you get called away and you can't go, did you intend to see a movie? That's what the law criminalizes in the attempted commission of a crime, a substantial step.

RP 783-84.

The prosecutor's analogy not only trivialized the gravity of the State's charges but it also presumed the specific intent required for each

charge—as to count one, intent to engage in sexual intercourse and, as to count two, intent to agree to pay a fee in exchange for sexual conduct.

iii. *Urging the jury to send a message by holding Jacobson responsible*.

In his final words during rebuttal, the prosecutor told the jury, "And now it's up to you folks to hold [Jacobson] responsible for what he did." RP 829. Jacobson objected ("*Objection. That's not what they are supposed to be doing.*"), but the court overruled the objection. RP 829.

The trial court should have stricken the argument because a prosecutor commits misconduct by encouraging jurors to decide the case based on anything other than "probative evidence and sound reason." *State v. Fedoruk*, 184 Wn. App. 866, 890, 339 P.3d 233 (2014) (quoting *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). Mr. Neeb's argument urged the jury to convict Jacobson on a basis other than the State's proof of the elements beyond a reasonable doubt. He argued the jury should "hold him responsible"; in other words, make Jacobson accountable. RP 829. The prosecutor's argument appealed to a sense of morality and social responsibility and urged the jury to use the verdict to send a message. But that is not the jury's job. *See State v. Bautista–Caldera*, 56 Wn. App. 186, 195, 783 P .2d 116 (1989) (misconduct to argue the jury should convict to send a message); *State v.*

Neal, 361 N.J. Super. 522, 826 A.2d 723, 733-34 (N.J. 2003) (prosecutor's request that jury hold the defendant accountable constituted improper "send a message to the community" misconduct); *State v. Acker*, 265 N.J. Super. 351, 627 A.2d 170, 173 (N.J. 1993) ("Warnings to a jury about not doing its job is considered to be among the most egregious forms of prosecutorial misconduct.").

The prosecutor's argument that the jury should hold Jacobson responsible was also an improper suggestion that Jacobson should be held guilty by association and that there is a problem that needs to be solved by arrest, prosecution and the jury's guilty verdict.

Yet, the court's ruling "lent an aura of legitimacy to what was otherwise improper argument." *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). This increased the likelihood that the misconduct affected the jury's verdict. *State v. Swanson*, 181 Wn. App. 953, 964, 327 P.3d 67 (2014) (quoting *State v. Perez-Mejia*, 134 Wn. App. 907, 920, 143 P.3d 838 (2006)).

d. The prosecutor committed misconduct that lessened the presumption of innocence by inflaming the jurors' passions and prejudices, arguing facts not in evidence and disparaging the defense.

The prosecutor also committed misconduct by inflaming the jury's passions and prejudices, arguing facts not in evidence and disparaging the defense.

i. *Inflaming the jurors' passions and prejudices throughout closing argument*.

"The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." *Glasmann*, 175 Wn.2d at 704 (quoting Am. Bar Assoc'n, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980)). A prosecutor has "wide latitude" to draw and argue reasonable inferences from the evidence, but he may not "invite the jury to decide any case based on emotional appeals." *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986).

The prosecutor violated this precept on several occasions. During opening, the prosecutor told the jury, "The Casual Encounter section of Craigslist is filth like almost no other." RP 120. In that area of Craigslist, he told the jury they could find "people offering up all kinds of stuff you cannot believe, and the filthier the better in some respects." RP 121. He concluded his opening statement by drawing again on this appeal to the jury's prejudices: "And I am also going to apologize in advance for some

of the evidence and some of the things you are going to see in this case because they are offensive content. Unfortunately, it's the defendant's actions that are bringing us here today." RP 125-26.

In closing, the prosecutor further inflamed the jury's passions and prejudices and argued facts not in evidence:

> A lot of our law is a gray area. There aren't many things that are black or white, one or the other, but I am going to suggest to you that there is one thing that is black and white, and that's this: An adult will either have sex with a child or will not. There isn't any gray area there. An adult either will or will not.
>
> And I am going to go a little bit further than that and say that an adult that is willing to talk about having sex with a child falls in the category of an adult who will because there isn't any adult in our society to whom the idea of sex with a child is repulsive, who will talk about having sex with a child. That doesn't happen in the real world.

RP 786-87. This argument was an improper inflammation of the jury's passion and prejudices that obscured the State's burden to prove each element of the offense and was based entirely on facts not in evidence.

ii. *Relying on facts not in evidence*.

A prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). As this Court noted in *Pierce*, misconduct by appeals to the jury's passions and prejudices is closely

related to facts-not-in-evidence misconduct because "appeals to the jury's passion and prejudice are often based on matters outside the record." 169 Wn. App. at 53 (citing *State v. Belgarde*, 110 Wn.2d 504, 507-10, 755 P.2d 174 (1988); *State v. Claflin*, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984)).

In addition to the inflammatory argument discussed above, the prosecutor argued without evidentiary support that the police arrested Jacobson before he reached the operation's house because law enforcement could not take a chance that the situation would become more dangerous. RP 784-85. This argument was not supported by the evidence. Rodriguez testified that Jacobson was arrested "en route," and that the police planned to arrest him at the house. RP 307-08, 332. Rodriguez testified generally that "safety is involved" in a "meet up," but there was no evidence as to what these eventualities might entail. RP 311.

In *State v. Jones*, 144 Wn. App. 284, the prosecutor committed misconduct by arguing the defendant was "dangerous," which claim lacked evidence in the record. Labeling Jacobson "dangerous" not only relied on facts not in evidence but sought to instill fear in the jury and to secure a conviction on that basis.

The prosecutor further relied on facts not in the record to disparage Jacobson's defense. He lumped Jacobson together with the mass of guilty

defendants to argue, "There are three defenses in a criminal case, generally speaking." RP 785. He elaborated,

> First one is, I did not do it. It was someone else. The second one is, I may have done something, but the State can't prove it. Let's make the State prove it. And the third one is, I did it, darn right I did it, but I had an excuse or a justification of doing it; self-defense, for example, or an accident.

RP 785-86. There was no evidence in the case regarding defenses in criminal trials generally. Thus the prosecutor's argument was misconduct because it relied on facts not in evidence.

The prosecutor's misconduct was even more egregious, however. First, he failed to include the "fourth alternative" criminal defense, which was applicable here: I did something but it is not illegal. That was Jacobson's defense, but the prosecutor left it out entirely. Second, the prosecutor not only packaged Jacobson with all other defendants, but he also disparaged the defense by indicating he had made a choice to pursue a particular defense: "In this case, the defendant has chosen to kind of combine a couple of things. . . . So he is combining – because if – he doesn't have a legal excuse. He is going on a factual excuse, which is, I am going to tell the jury that I thought she was pretend so that the State can't prove that I thought she was real." RP 786. It is patently improper for the prosecutor to use the first person singular to step into the

defendant's shoes. *Pierce*, 169 Wn. App. at 554. The prosecutor committed misconduct by relying on facts not in evidence, disparaging the defense, and stepping into the defendant's shoes to attribute thoughts not in evidence to Jacobson.

iii. *Disparaging the defendant, the defense, and defense counsel*.

The misconduct continued. It is misconduct for the prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant. *Lindsay*, 180 Wn.2d 423; *Glasmann*, 175 Wn.2d at 706-07 (prosecutor cannot express an individual opinion of the defendant's guilt). By opining on the credibility of the defendant's testimony, a prosecutor "violates the advocate-witness rule, which prohibits an attorney from appearing as both a witness and an advocate in the same litigation." *Lindsay*, 180 Wn.2d at 437.

In *Lindsay*, another Pierce County deputy prosecutor called the defense a "crock" and the defendant's testimony "funny," "disgusting," "comical," and "the most ridiculous thing I've ever heard." *Id*. at 429. Labeling the defendant's testimony "the most ridiculous thing I've ever heard" carried no reasonable interpretation except that it was an expression of the prosecutor's personal opinion of the defendant's credibility. *Id*. at 437-38.

As in *Lindsay*, the prosecutor's argument that Jacobson's "explanation" was "BS" constituted a forbidden expression of the prosecutor's personal opinion of Jacobson's credibility. [8] *See* RP 791-92.

This misconduct dovetailed with the prosecutor's repetitive, argumentative and editorialized cross-examination of Jacobson. *E.g.*, RP 608-09 (objection sustained to prosecutor's question "do you think it sounded truthful?"); RP 610-11, 710, 729, 730, 747 (objections to argumentative questioning are sustained); RP 626 (objection sustained to prosecutor's request to defendant to "agree" not to "editorialize"); RP 709 (objection to prosecutor's question whether Jacobson "had occasion to successfully bring a woman to an orgasm" is sustained); RP 749-50 (objection sustained where prosecutor asks Jacobson for a legal conclusion). The prosecutor's cross-examination presented so many objectionable questions that, towards the end, the court *sua sponte* corrected him:

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[8] The prosecutor in fact predicted his own misconduct, telling the jury,

> Let me say at the outset of this that I am going to use the word "I" multiple times in this closing argument. It is not my personal opinion. My personal opinion has no place in this case. So when I use the word "I," I am not telling what I think. I am telling you what the evidence shows and what the law shows.

RP 780.

> Q: Mr. Jacobson, listen. I am asking you a specific question. I am not asking you to editorialize your answer.
>
> THE COURT: Well, let's get the question then instead of editorial. Let's get the question.

RP 759.

e. The pervasive and far-ranging misconduct was objected to in part, was flagrant and ill-intentioned, and unfairly prejudiced the trial.

Objected-to misconduct requires reversal when there is a substantial likelihood it affected the jury's verdict. *Perez-Mejia*, 134 Wn. App. at 916. Misconduct without an objection requires reversal if it is flagrant and ill-intentioned. *Emery*, 174 Wn.2d at 763.

The higher the frequency of the misconduct, the less likely it could have been cured by an instruction. *See Glasmann*, 175 Wn.2d at 707. Moreover, arguments that have an "inflammatory effect" on the jury are generally not curable by a jury instruction. *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012). In examining misconduct based on facts not in evidence and comments that deliberately appeal to the jury's passion and prejudice, the "focus must be on the misconduct and its impact, not on the evidence that was properly admitted." *Glasmann*, 175 Wn.2d at 711.

The prosecutor's misconduct in this case covered a broad spectrum: lessening Jacobson's constitutional rights, inflaming the jury's passions and prejudices, misstating the law, encouraging a verdict on

improper bases, relying on facts not in the record, and vouching for police witnesses, and using voir dire for prohibited education and insertion of the prosecutor's views. Cumulatively, the pervasive misconduct was both incurable and substantially likely to have affected the verdict. *See Perez-Mejia*, 134 Wn. App. at 917-21 (reversing murder conviction for multiple instances of misconduct that cumulatively denied the accused a fair trial).

2. The police conduct in pursuing its Net Nanny operation violated Jacobson's constitutional due process right because the conduct is so shocking to a universal sense of fairness.

Outrageous police conduct that shocks the universal sense of fairness violates due process and bars the government from invoking the judicial process to obtain a conviction. *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). Because the issue implicates constitutional due process, it may be raised for the first time on appeal. *Id*. at 19; U.S. Const. amends. V, XIV. It is a question of law considered by this Court de novo. *Lively*, 130 Wn.2d at 19.

a. <u>The government cannot prosecute for offenses it created or for government conduct that violates a fundamental sense of fairness.</u>

A claim of outrageous government conduct "is founded on the principle that the conduct of law enforcement officers and informants may be 'so outrageous that due process principles would absolutely bar the

government from invoking judicial processes to obtain a conviction.'" *Lively*, 130 Wn.2d at 19 (quoting *United States v. Russell*, 411 U.S. 423, 431-32, 93 S .Ct. 1637, 1643, 36 L. Ed. 2d 366 (1973)). Police conduct violates due process when it shocks a universal sense of fairness. *Id*. The focus is the government's behavior, not the extent of the defendant's predisposition. *Id*. at 21.

To decide whether the government's conduct offends due process, the Court must review the totality of the circumstances. *Lively*, 130 Wn.2d at 19. "Each case must be resolved on its own unique set of facts and each component of the conduct must be submitted to scrutiny bearing in mind 'proper law enforcement objectives—the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness.'" *Id*. at 21 (quoting *New York v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78, 83 (N.Y. 1978)).

To determine whether police conduct violates fundamental fairness, several factors are considered: (i) whether government conduct instigated the crime or merely infiltrated ongoing criminal activity, (ii) whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, (iii) whether the government controls the criminal activity or simply

allows it to occur, (iv) whether law enforcement's motive was to prevent crime or protect the public, and (v) whether the government's conduct itself amounted to criminal activity or conduct repugnant to a sense of justice. *Lively*, 130 Wn.2d at 22.

"Generally, the government may not manufacture a crime from whole cloth and then prosecute a defendant for becoming ensnared in the government's scheme." *United States v. Harris*, 997 F.2d 812, 816 (10th Cir. 1993). For example, in *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), "the government assisted and encouraged the defendant to set up a methamphetamine lab. The government provided the essential supplies and technical expertise, and when the defendants encountered difficulties in consummating the crime, the government readily assisted in finding solutions." *Harris*, 997 F.2d at 816. "[T]he nature and extent of police involvement in th[e] crime was so overreaching as to bar prosecution of the defendants as a matter of due process of law." *Twigg*, 588 F.2d at 377.

Like in *Twigg*, law enforcement engineered and directed the criminal enterprise from start to finish and Jacobson contributed nothing more than his presence and enthusiasm. *Harris*, 997 F.2d at 816. "Where the police control and manufacture a victimless crime, it is difficult to see how anyone is actually harmed, and thus punishment ceases to be a response, but becomes an end in itself." *United States v. Bogart*, 783 F.2d

1428, 1436 (9th Cir. 1986), *vacated in part on hearing on other grounds by United States v. Wingender*, 790 F.2d 802 (9th Cir. 1986).

b. The government's conduct here offends fundamental fairness because the police instigated and controlled the activity, the police used pleas to overcome Jacobson's reluctance, and law enforcement's conduct was repugnant to a sense of justice.

The totality of the circumstances demonstrates the government's conduct was outrageous. The first factor, whether government conduct instigated the crime or merely infiltrated ongoing criminal activity, points towards outrageous conduct because the government had no basis to suspect or target Jacobson prior to this operation. *See Lively*, 130 Wn.2d at 22-24. Rodriguez testified that the Task Force takes a "proactive" role of "going after" people it "believes" want to do harm to children. RP 132. There was no evidence Jacobson was involved in illegal activity prior Rodriguez's fake advertisement. *Lively*, 130 Wn.2d at 23 (police aware of no prior criminal activity). While the police suspected criminal activity was afoot on the Casual Encounters section of Craigslist, the same was true in *Lively* (police had information that drugs were sold during addiction recovery meetings), and there is also lawful activity that occurs on Craigslist's Casual Encounters section. *Lively*, 130 Wn.2d at 33 (Durham, C.J., concurring in part, dissenting in part); *see Twigg*, 588 F.2d at 379-80 (distinguishing between situations where police approach

defendant to initiate criminal activity and those where the criminal plan is formulated and initiated by the defendant and the government joins the ongoing criminal activity after the defendant began implementing it). This factor accordingly weighs in favor of a violation of fundamental fairness.

The police also used pleas of sympathy and persistent solicitation to lure Jacobson back in after he showed a desire to exit. In text exchanges, Rodriguez as Kristl appeared to reject Jacobson's insistence on parameters, texting him "so have a great life. like i said. i have a system and it has kept me out of trouble. i will not change." Ex. 4, p.10. Jacobson responded by indicating he was prepared to end the discussion: "Ok." Ex. 4, p.11. But Rodriguez did not end the discussion; he persisted by texting "so that means no go right?" and then proceeded to negotiate terms with Jacobson and send him an additional photograph of two smiling women in Santa hats with a sign that reads "John Don't you want to open our presents?!! 12-16-15". Ex. 4, p.11. Rodriguez continued to pursue Jacobson, next texting him "Soooooooo," rather than wait and see what Jacobson initiated or was willing to initiate. Ex. 4, p.11.

This persistence was ongoing. Rodriguez as Kristl provided Jacobson with the address of a gas station where "she" could view Jacobson before he came over to the house. Ex. 4, p.10. Jacobson told Kristl he did not want to go forward with the plan: "To be honest, I'd feel

better if we could all just meet somewhere, and have an innocent chat over coffee or ice cream or something." Ex. 4, p.10. The police responded, "no way JOhn. i have a systime. answer a different ad then." *Id.* Texting as Kristl, the police continued to resist any effort by Jacobson to arrange a lawful meeting.

Jacobson again expressed reluctance, and it was again met with Rodriguez as Kristl not backing down but, instead, increasing the pressure. Jacobson messaged "I just drove by the address you gave me for the 76 station, and you gave me the address to a home residential neighborhood. So sorry, this is all seeming to be something it's really not." Ex. 4, p.11. Here, Rodriguez did not accede to Jacobson's reluctance; as Kristl he responded, "really? i googled it. ill look it up again" and then provided the address to coax Jacobson to drive over despite his reluctance. Ex. 4, p.11. Even when Jacobson explained he "got a little spooked, I did leave the area and I'm headed home[,]" Rodriguez as Kristl continued his pursuit, however, by providing an alternative address. Ex. 4, p.12.

When Jacobson suggested another online conversation, Rodriguez finally seemed to be "done with" Jacobson, only to lure him back in with a fake emotional plea. Ex. 4, p.12. Rodriguez texted "im done with you . . . i will find someone else." Ex. 4, p.12. To which Jacobson again replied, "Ok." *Id*. But again, Rodriguez would not let Jacobson exit, responding

"I am upset with you now. I have to tell [my fictitious daughter, Lisa] you aren't coming. I shouldn't have let . . . her talk to you." RP 322; Ex. 4, p.12. Jacobson responded "Ugh…I feel bad" and was drawn right back into Rodriguez's scheme. Ex. 4, p.12 et seq. This factor therefore weighs heavily in favor of outrageous government conduct.

In *Lively*, the Court held the government controlled the criminal activity because police conduct was "so closely related" to the defendant's actions. 130 Wn.2d at 25-26. The same is true here. Law enforcement posted the advertisement that prompted Jacobson's response; it outlined the terms that it believed constituted attempted criminal conduct (such as the ages of the children); it dictated the mediums on which the communications continued; and law enforcement set the terms of the supposed encounter. In fact, more than in *Lively*, where the police were working through an informant over whom they had limited control, here the activity was entirely conducted by police officers themselves. *See, e.g.*, *Lively*, 130 Wn.2d at 33-34.

The next factor looks at whether law enforcement's motive was to prevent crime or protect the public. In *Lively*, the Court found the government conduct demonstrated greater interest in creating crimes to prosecute than in protecting the public from further criminal behavior because law enforcement targeted a recovering drug addict who had no

known prior connection to the sale of drugs or any other known criminal predisposition. 130 Wn.2d at 26. Here, too, the government's conduct, viewed objectively, created crimes to prosecute. The Task Force depends upon private donations, and those donations will only continue if law enforcement can tout results in the form of arrests and prosecutions. RP 358-62; *see* RCW 13.60.110(4) ("The chief of the state patrol shall seek public and private grants and gifts to support the work of the task force."). In this case and in related cases, the conduct targeted individuals with no known criminal history and no known predisposition. *E.g.*, *State v. Racus*, No. 49755-7-II, Opening Brief at 3 (filed Jun. 9, 2017); RP 119-20 (prosecutor notes in opening argument that most individuals arrested through Net Nanny operations were not registered sex offenders); Drew, Kristen, "WSP arrests 9 in child exploitation operation in Kitsap Co.," KOMO News, http://komonews.com/news/local/wsp-arrests-9-in-child-exploitation-operation-in-kitsap-co-11-21-2015 (Sept. 4, 2015) ("According to the prosecuting attorney, none of the suspects arrested in 'Operation Net Nanny' have any prior felony convictions."). The Task Force's conduct puts the police in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing." *Twigg*, 588 F.2d at 379 (quoting *United States v. West*, 511 F.2d 1083, 1085 (3d Cir. 1975)).

The final factor considers whether the government's conduct itself amounted to criminal activity or conduct repugnant to a sense of justice. The police placed vague advertisements on a free website pursuing anyone who they might actually be able to entice to show up. In this case, the police took playful pictures, Ex. 4, pp.6 (photo of "Kristl" and "Lisa"), 11 (wearing Santa hats, holding sign "John Don't you want to open our presents?), distributed teenage pictures of a state trooper who "looked young" and enlisted that trooper in the Task Force. Rodriguez repeatedly refused Jacobson's attempts to end the correspondence. Even if those attempts to exit the scheme were not entirely unequivocal, the police's role is not to lure a reluctant citizen. Moreover, the Task Force completely controls the age of the fictitious minor, thereby directing the level of crime with which Jacobson and others could eventually be charged. "[W]hen the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative." *Twigg*, 588 F.2d at 379 (quoting *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971)).

On the whole, the government's conduct was so outrageous that it violates the common sense of fundamental fairness. Jacobson's

convictions should be reversed because they violate his right to due process.

3. The State failed to prove that Jacobson attempted to agree to pay a fee, an essential element of the attempted commercial sexual abuse of a minor charge.

The State must prove every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Hummel*, 196 Wn. App. 329, 352-59, 383 P.3d 592 (2016).

On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010). Where the jury is not asked to specify whether it unanimously agreed on a particular alternative means and insufficient evidence supports one of the alternative means, there is a danger the verdict rests on an invalid ground. *State v.*

Armstrong, __ Wn.2d __, 394 P.3d 373, 379 (2017). Therefore, the conviction must be reversed. *Id*.

The evidence is insufficient here on independent bases. Either the State elected the "agreement to pay a fee" alternative and the evidence was insufficient to prove "a fee," or there was no election and the evidence was insufficient on the alternative means that Jacobson

a. There was no evidence that a fee was at issue.

RCW 9.68A.100 criminalizes an individual who pays or agrees to pay "a fee" to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her. RCW 9.68A.100(1)(b). The statute likewise prohibits soliciting, offering, or requesting to engage in sexual conduct with a minor in return for "a fee." RCW 9.68A.100(1)(c). Each of these means uses the specific "fee" language and the jury was instructed on both means. CP 35 (instruction defining commercial sexual abuse of a minor).

A "fee" is "a fixed charge" or "a sum paid or charged for a service." Merriam-Webster, https://www.merriam-webster.com/dictionary/fee (last visited Jun. 29, 2017). While "fee" is not defined in Chapter 9.68A RCW, it is used frequently in the revised code to refer to a sum of money. *E.g.*, RCW 82.02.090(3) (defining "impact fee" as "a payment of money"); RCW 36.18.020 (setting forth various "clerk's

fees, surcharges"); RCW 46.61.5054 (additional fees for alcohol violators).

Jacobson never agreed to pay nor solicited, offered or requested a sum of money; Kristl never asked for a sum of money; there was, quite simply, no discussion—implicit or explicit—of an exchange of money. RP 371 (Rodriguez testifies there was no agreement that money would be exchanged for sex). The closest evidence the State could produce was "Kristl's" suggestion of a gift card. *Id*. But a gift card is not a "fee." Certainly the clerk of the court would not accept a gift card to pay a filing fee. Nor does the term "attorney's fees" account for payment by gift card. *See* RCW 4.84.010.

Tellingly, in 2017—after Jacobson's trial, the Legislature amended RCW 9.68A.100 to change "pays or agrees to pay a fee" to broader language: "provides or agrees to provide anything of value." Laws of 2017, ch. 231, § 3; Senate Bill Report, SB 5030 (Apr. 6, 2017) (amended version "broadens" forms of payment criminalized under statute)[9]. A similar federal statute criminalizing the trafficking of children uses this term, "anything of value," instead of Washington's prior "fee" language 18 U.S.C. § 1591. Perhaps under this amendment, a gift card would be

[9] *Available at* http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bill%20Reports/Senate/5030%20SBR%20HA%2017.pdf.

sufficient. *See* RCW 9.46.0285 (defining "thing of value" with regard to gambling). But, Jacobson was charged under the prior version of the statute.[10]

Our courts honor the linguistic choices the Legislature makes when it enacts laws. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). "The Legislature is presumed not to pass meaningless legislation, and in enacting an amending statute, a presumption exists that a change was intended." *Spokane Cty. Health Dist. v. Brockett*, 120 Wn.2d 140, 154, 839 P.2d 324 (1992). The change in the language conclusively demonstrates that "fee" and "anything of value" have different meanings.[11] *See* Senate Bill Report, SB 5030 (noting amended version "broadens" forms of payment criminalized by RCW 9.68A.100).

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[10] At the public hearing on Senate Bill 5030, Rodriguez testified in support of the broader language in the amendment that, from his experience in online undercover investigations with the Task Force, "it isn't just the term money" that is being offered or requested in exchange for sexual contact; the amendment to "anything of value" would cover items he has seen offered like "tracphone minutes" and "gift cards." Testimony of Sergeant Carlos Rodriguez, Senate Law & Justice Committee Public Hearing on SB 5030 at 1:09:57–1:10:30 (Jan. 17, 2017 at 10:00am), *available at* https://www.tvw.org/watch/?eventID=2017011203.

[11] Even if an agreement to provide a gift card could be construed as an agreement to pay a fee, the evidence was insufficient to show the gift card agreement was "pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her." The communications did not indicate that any activity or meeting was contingent upon Jacobson bringing or agreeing to bring a gift card or anything else. *See* Ex. 4, pp.6-9, 13.

Because the Legislature used the term "fee" here, and not the language "anything of value," the State was required to prove an agreement to pay a fee. As Rodriguez conceded, the State could not show any evidence of agreement to exchange a sum of money. RP 371. Accordingly, the State failed to prove attempted commercial sexual abuse of a minor.

b. The evidence was insufficient to show Jacobson solicited, offered, or requested to engage in sexual conduct with a minor in return for a fee.

Because the jury instructions allowed the jury to find commercial sexual abuse of a minor under either alternative means—that Jacobson agreed to pay a fee or solicited, offered, or requested to engage in sexual conduct with a minor in return for a fee—the State was required to present sufficient evidence of each alternative. CP 35 (instruction defining commercial sexual abuse of a minor); RCW 9.68A.100; *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When a trial court does not instruct on unanimity, the error is harmless only if no rational trier of fact could have entertained a reasonable doubt that each act sufficient to constitute the

crime charged was proved beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 406; Const. art. I § 21.

While in closing argument, the prosecutor referred primarily to Jacobson's agreement to pay a fee, RP 778, 781-82, 829, the State did not expressly elect this alternative or exclude the solicit, offer or request alternative. The State therefore failed to elect a particular means. *See State v. Carson*, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015); *State v. Williams*, 136 Wn. App. 486, 497, 150 P.3d 111 (2007).

The conviction must be reversed because the State failed to prove Jacobson solicited, offered or requested to engage in sexual conduct with a minor in return for a fee. The evidence plainly shows Rodriguez, as Kristl, was the first to propose any "gifts." Ex. 4, p.6 (Kristl sends message "so when[.] are you okay with gifts she loves gifts"). Jacobson then asked what she likes and responded vaguely, "ok." Ex. 4, p.7. Jacobson never initiated any discussion regarding gifts, roses, fees, or any other items. *See* Ex. 4, pp.8-9 ("Kristl" asks about "gifts or donations"), p.13 ("Kristl" asks "are you still good with gifts?"). Therefore, no reasonable juror could have found that he solicited, offered, or requested to engage in sexual conduct in return for a fee.

On one or both of these grounds, the evidence of attempted commercial sexual abuse of a minor was insufficient. The conviction should be reversed and the charge dismissed.

4. The State failed to prove Jacobson attempted to engage in sexual intercourse with a minor under 12 years of age, requiring reversal and dismissal of the attempted rape of a child count.

The State also charged Jacobson with attempted rape of a child in the first degree. CP 1-2. But the evidence was insufficient for this count as well.

To prove attempted rape of a child in the first degree, the State must prove beyond a reasonable doubt that the accused took a substantial step toward having sexual intercourse with a minor less than 12 years old and not married to the accused, and that the accused is at least 24 months older than the minor. RCW 9A.44.073. Attempt requires the State to prove the accused, "with intent to commit a specific crime[,]" "does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020.

The State was required to prove a specific intent to satisfy this charge. "[T]he intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse." *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996).

The State was also required to prove Jacobson took a substantial step. To constitute a substantial step, the conduct must be strongly corroborative of the defendant's criminal purpose. *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978). "Mere preparation to commit a crime is not a substantial step." *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).

In short, the elements of attempted rape of a child in the first degree, which the State was required to prove beyond a reasonable doubt, are that Jacobson (1) with intent to have sexual intercourse (2) took a substantial step towards having sexual intercourse with a child under the age of 12.

The State's proof failed. First, the State did not prove a substantial step toward sexual intercourse with a minor under 12 years old because the evidence of the fictitious child's age was ambiguous. Rodriguez's advertisement on Craigslist did not mention ages or sexual intercourse. Ex. 1. Neither party mentioned ages in the subsequent email exchange. Ex. 2. By text message, Rodriguez through Kristl mentioned the fictitious daughter was "11 nearly 12." Ex. 4, p.1. Jacobson asked for a photograph and was sent a picture of a 15 or 16 year old. RP 258, 261; Ex. 4, p.1. Jacobson later confirmed the children's ages as "12 8 and ?" Ex. 4, p.8. Rodriguez did not correct Jacobson to explain that "Lisa" was actually

only 11 years old. Instead, he simply responded with the age of the fictitious boy (the question mark in Jacobson's message), my "son is 13." Ex. 4, p.8.

As mentioned, Rodriguez also sent photographs of Washington State Trooper Anna Gasser at age 15 or 16 years old, not of a child under 12 years old. RP 258, 261; Ex. 4, pp.1, 2. In the second picture, at least, it is clear that the photographed girl is post-pubescent. Rodriguez also sent Jacobson a photograph of Trooper Gasser as an adult, although she is standing behind "Kristl." Ex. 4, p.11.

On the telephone, "Kristl" described her older daughter as "soon to be 12-year[s] old." Ex. 8, p.2. And Jacobson actually spoke on the phone with an adult, Trooper Anna Gasser, not a child under 12. Ex. 9.

The State also did not prove intent to have sexual intercourse. *See Chhom*, 128 Wn.2d at 743. During a phone call, Jacobson tells "Lisa" "we can kind of play it by ear, you know . . . whatever you wanna explore or experience to try out, you can and then (Unintelligible) some play time when I come over." Ex. 9, p.2. He told "Lisa," "it's hard to say [what kind of stuff we might do] without ever having met you before, you know? And so it's more about just kind of, you know (Unintelligible) and exploring whatever might feel good and if it doesn't feel good or it's not liked, then stop (Unintelligible)." Ex. 9, p.3. He confirmed the intent to

meet first and determine actions thereafter during his first conversation with "Kristl": proposing "an innocent way to meet and just make sure that we're all who we represented ourselves to be and then we can go from there, whether to move forward or not." Ex. 8, p.2; Ex. 7 at 3:47-4:01.

The evidence here bears marked similarity to the insufficient evidence in *State v. Grundy*, 76 Wn. App. 335, 886 P.2d 208 (1994). In that case, an undercover police officer posed as a drug dealer, approached the defendant, and asked him what he wanted. The defendant responded that he wanted "20 of coke" and affirmed that he had the money. The police officer asked to see the defendant's money and the defendant said he wanted to see "the stuff" first. 76 Wn. App. at 336. The police officer then placed him under arrest and he was charged with attempted possession of a controlled substance. *Id*. This Court reversed the conviction for attempted possession, reasoning that the substantial step must be more than mere preparation and "[t]he parties were still in the negotiating stage." *Id*. at 338.

Here, as in *Grundy*, Jacobson remained in the negotiating stage. He had not committed to any particular acts and indicated his intent to remain noncommittal until the parties had met.

This case is therefore in contrast with other cases where the Court has found sufficient evidence of attempted rape of a child based on the

accused's unambiguous expressions of intent to have sexual intercourse, unambiguous evidence of the child's age, and a substantial step in furtherance of the intent to have sexual intercourse with the child beyond mere preparation. *Townsend*, 147 Wn.2d at 671 (sufficient evidence of attempted rape of a child in the second degree where accused exchanged emails of a graphic sexual nature, arranged to meet 13-year-old at a motel room, went to motel room at the appointed time, knocked on the door, and asked to see the 13-year-old); *State v. Sivins*, 138 Wn. App. 52, 155 P.3d 982 (2007) (sufficient evidence of attempted rape of a child in the second degree where accused had repeated sexual conversations with fictitious 13-year-old, specifically told her he wanted to have sex with her, arranged to meet her at a motel in her hometown, rented a motel room for two in her hometown five hours away, gave her the room number, and "brought condoms, lubricant, alcohol and other items" with him); *State v. Wilson*, 158 Wn. App. 305, 242 P.3d 19 (2010) (sufficient evidence of rape of a child in the second degree where accused arranged to have "oral and full sex" with a 13-year-old girl for $300, went to designated meeting place with $300, waited for 30 minutes, and signed statement that he intended to have sex with a 13-year-old).

Because the evidence was insufficient to show Jacobson intended to have sexual intercourse with a person under the age of 12 and took a

substantial step toward having sexual intercourse with a person under the age of 12, the conviction should be reversed and the charge dismissed.

5. The overbroad conditions prohibiting Jacobson from all unsupervised internet use and from using any device with internet acess is a violation of his First Amendment rights..

At sentencing, the trial court imposed two conditions of community custody barring Jacobson's access to the internet. Supp CP __ (Appendix H, p.2). The two conditions provide as follows:

> [X] No internet access or use, including email, without the prior approval of the supervising CCO.
>
> [X] No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone or computer-related device to which the defendant has access to monitor compliance with this condition.

Id. These condition must be stricken because they unreasonably infringe on Jacobson's First Amendment rights.

A court's sentencing conditions are reviewed for abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). A sentencing court abuses its discretion by imposing a condition that is unconstitutional. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

In general, the First Amendment[12] prevents the government from proscribing speech or expressive conduct. *State v. Halstien*, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). Individuals on community custody have a right to access and transmit material protected by the First Amendment. *See Bahl*, 164 Wn.2d at 753. In other words, a person does not lose his First Amendment rights because he is subject to community custody.

Overbreadth analysis measures how statutes, or conditions of community custody, that prohibit conduct fit within the universe of constitutionally protected conduct. *See Halstien*, 122 Wn.2d at 121. A condition of community custody is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment. *See id.*

The Court carefully scrutinizes sentencing conditions that interfere with fundamental constitutional rights. *Rainey*, 168 Wn.2d at 374. Conditions that interfere with fundamental rights must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." *Id*. They must be narrowly drawn and there must be no reasonable alternative way

[12] The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech."

to achieve the State's interest. *State v. Warren*, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008).

Unlike statutes, conditions of community custody are not presumed valid. *Bahl*, 164 Wn.2d at 753.

The internet is unquestionably a critical medium for transmitting and receiving communications and expressive materials that are protected by the First Amendment. The internet is a "unique and wholly new medium of world-wide human communication" that "enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 850, 117 S. Ct. 2329, 138 L. Ed. 874 (1997) (internal quotation marks and citation omitted). It is a widely-accessible, low-cost, "dynamic, multifaceted category of communication," which encompasses content "as diverse as human thought." *Id*. at 870 (internal quotation marks and citation omitted).

Due to the crucial and widespread role the internet plays in enabling human communication, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id*. The government may not regulate access to the internet in a manner that silences speakers whose messages are entitled to constitutional protection, unless it meets the heavy burden of demonstrating a compelling

governmental need that could not be achieved through a less restrictive provision. *See id*. at 874, 879.

In determining whether a condition of probation barring a probationer from accessing the internet is overly broad, courts generally ask whether the condition involves a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct and protect the public. *United States v. Freeman*, 316 F.3d 386, 391-92 (3d Cir. 2003). Courts examine the length and breadth of the prohibition, as well as the nature and severity of the offender's underlying conduct. *United States v. Maurer*, 639 F.3d 72, 83 (3d Cir. 2011).

A total ban on internet access is particularly likely to encroach unreasonably on protected liberties because such a ban "prevents use of e-mail, an increasingly widely used form of communication and . . . prevents other common-place computer uses such as 'do[ing] any research, get[ting] a weather forecast, or read[ing] a newspaper online.'" *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (citation omitted). Fifteen years after the *Sofsky* Court noticed the intrinsic nature of the internet, its usage has only become more ingrained in everyday personal and professional life. As the Supreme Court recently held, "cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular" are among the most important places for the exchange of views

protected by the First Amendment. *Packingham v. North Carolina*, __ U.S. __, 137 S. Ct. 1730, 1735, __ L. Ed. 2d __ (2017). "While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be." *Id*.

A restriction that forbids a person from using a computer also infringes upon a person's rights to free speech because computers are the vessels that allow people to access the internet. *See Reno*, 521 U.S. at 844 (referring to the internet as "an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world").

A "computer" is a "programmable usually electronic device that can store, retrieve, and process data." Merriam-Webster, https://www.merriam-webster.com/dictionary/computer (last visited Jun. 9, 2017). Computers are used for expressive conduct, including making art, writing poetry, or drafting a letter to one's congressperson. *See, e.g.*, *Packingham*, 137 S. Ct. at 1735-36 (discussing importance of Internet and social media for engaging politicians and political discourse); *United States v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009) (noting

"importance of the internet in today's world" includes filing tax returns, conducting e-commerce, government communications, and legal activities).

Cell phones, likewise, are now essentially "minicomputers." *Riley v. California*, __ U.S. ___, 134 S. Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014) ("The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone."). Modern cell phones also function as "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, [and] newspapers." *Id*.

The conditions of community custody barring Jacobson from using the internet and from using any computers, phone or computer-related devices with access to the internet is overly broad in violation of his First Amendment rights.

Courts have struck down a total ban on an individual's use of the internet and computing devices, even where the internet was involved in the offense. For example, in *United States v. White*, the court struck a condition that barred the defendant (convicted of receiving child pornography) from possessing a computer with internet access because the condition was simultaneously "potentially too narrow and overly broad." 244 F.3d 1199, 1206 (10th Cir. 2001). The Court noted a more targeted

means of restricting access to "objectionable material" that would still allow the individual to exercise his First Amendment right to freedom of communication:

> filtering software is available to interpose a barrier between the computer's web browser and Internet connection. These programs filter objectionable material either by blacklisting sites and removing them from access, or by whitelisting the sites, blocking access to all sites except those listed on the "white" list based on categories of content.

Id.

Here, similar software could actualize the State's intent while observing Jacobson's First Amendment rights. Instead, the trial court imposed an unduly restrictive approach that severely inhibits Jacobson's ability to engage in the "e-marketplace of ideas." The conditions relating to Jacobson's ability to access the internet and use a computer were certainly not narrowly drawn.

In *Packingham*, the Supreme Court held unconstitutional a North Carolina statute that barred sex offenders from accessing social media sites. 137 S. Ct. at 1738. "Social media," just one portion of the Internet from which Jacobson has been banned, "allows users to gain access to information and communicate with one another about it on any subject that might come to mind." *Id*. at 1737. "By prohibiting sex offenders from using those [social media] websites, North Carolina with one broad

stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id*. The statute was unconstitutional because it foreclosed access to social media altogether, thus "prevent[ing] the user from engaging in the legitimate exercise of First Amendment rights." *Id*.

As in *Packingham*, the community custody conditions here are overbroad because they constitute a wholesale prohibition on access to the Internet without specific prior approval.

United States v. Freeman, 316 F.3d 386 (3d Cir. 2003) is also on point. There, the court struck a special condition of supervised release that banned the defendant from possessing any computer in his home or using any online computer service without his probation officer's written approval because the condition was overly broad. 316 F.3d at 387, 391. The court noted that, even 14 years ago, a total ban on internet access prevents the use of email, getting a weather forecast, or reading the newspaper. *Id*. at 392. Concluding "there is no need to cut off [the defendant's] access to email or benign internet usage when a more focused restriction, limited to pornography sites and images, can be enforced by unannounced inspections or material stored on [the defendant's] hard drive or removable disks," the court held this condition "involved a greater

deprivation of liberty than is reasonably necessary to determine future criminal conduct and protect the public." *Id*. at 391-92.

This Court should reach the same conclusion. Banning Jacobson from the internet in whole without prior approval and from all but employment-related computer usage where internet access is available, unnecessarily cuts him off from the world and the free exchange of ideas. *See Perazza-Mercado*, 553 F.3d at 72-74 (striking condition that prohibited all home internet use).

While these near-complete bans were struck down in *White* and *Freeman*, courts have upheld conditions that only limit or restrict internet access. *E.g.*, *United States v. Legg*, 713 F.3d 1129, 1132 (D.C. Cir. 2013) (upholding single device limitation, noting it does not bar individual from using computers or the internet altogether).

The conditions barring Jacobson from using the internet and devices with access to the internet is unconstitutionally overbroad because they are not narrowly tailored to deter future criminal conduct or protect the public. The two conditions must be stricken.

F. CONCLUSION

From the outset of voir dire, the prosecutor ceased acting as a quasi-judicial officer and infected the trial with pervasive, prejudicial misconduct. Moreover, the Task Force's manufacturing of offenses

turned punishment into an end itself. This is outrageous government conduct that offends due process. For these and the additional reasons set forth above, the convictions should be reversed.

Alternatively, the community custody conditions restricting internet and computer usage should be stricken.

DATED this 29th day of June, 2017.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. ERIC JACOBSON, Appellant.	)))))))))	NO. 49887-1-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2017.

X_____

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